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No. - .

In the
Supreme Court of the United States.

OCTOBER TERM, 1982.

JOHN D. COLE, III,
PETITIONER,

v.

WESTINGHOUSE BROADCASTING COMPANY, INC.,
SEYMOUR YANOFF AND AMY KONOWITZ,
RESPONDENTS.

PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME JUDICIAL COURT OF MASSACHUSETTS.

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Questions Presented.

1. Whether constitutional standards first established by this Court in *New York Times Co.* v. *Sullivan* displace state law in cases of private defamation.

2. Whether those constitutional standards require a state court to depart from its settled rule of procedure for judgment notwithstanding the verdict by permitting issues abandoned during trial to be revived after a jury verdict and judgment.

3. Whether those constitutional standards immunize statements which otherwise would be defamatory *per se* because they attribute professional malpractice to a television journalist.

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RESPONDENTS.

PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME JUDICIAL COURT OF MASSACHUSETTS.

John D. Cole, III, petitions for a Writ of Certiorari to review the judgment of the Supreme Judicial Court of Massachusetts.

Opinion Below.

The opinion of the Supreme Judicial Court of Massachusetts is reported at 386 Mass. 303 (1982). A copy of the opinion appears in Appendix A.

Jurisdiction.

The opinion and order of the Supreme Judicial Court of Massachusetts were entered on May 20, 1982 (Appendices A and B). A timely Petition for Rehearing was denied on June 25, 1982 (Appendix B). The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3), because a title, right, privilege or immunity was claimed under the Constitution of the United States by the defendants below, which claim was sustained by the Supreme Judicial Court of Massachusetts on the basis of decisions of this Court.

The petitioner contends that the decisions of this Court require no such result and that the Supreme Judicial Court of Massachusetts should be so instructed. *Zacchini* v. *Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 568 (1977); *Oregon* v. *Hass*, 420 U.S. 714, 719 (1975); *Perkins* v. *Benguet Consolidated Mining Co.*, 342 U.S. 437, 443 (1952). Alternatively, any non-constitutional grounds for the Supreme Judicial Court's decision are so interwoven with the constitutional grounds so as not to be independent or are insufficiently broad to sustain the decision without the constitutional grounds. *Enterprise Irrigation District* v. *Farmers' Mutual Canal Co.*, 243 U.S. 157, 164 (1917).

Constitutional Provisions Involved.

The First Amendment to the United States Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the

right of the people peaceably to assemble, and to petition the Government for redress of grievances.

The Fourteenth Amendment to the United States Constitution provides in relevant part:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No states shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Statement.

Petitioner, John D. Cole, III, was fired from his job as a political news reporter at television station WBZ-TV in Boston in March, 1975. The spokesperson for WBZ (operated by respondent Westinghouse Broadcasting Company, Inc.) answered questions from two newspaper reporters by saying that Cole was fired because he was a "sloppy and irresponsible reporter" and had a "history of bad reporting techniques." Cole brought this action for defamation against Westinghouse, the general manager of the station (Seymour Yanoff) and the station spokesperson (Amy Konowitz) after these statements were republished by the newspapers. Over Cole's objection, the jury was instructed that Cole was required to prove by clear and convincing evidence that the defendants acted with actual

malice as defined in *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964), and subsequent cases. A two-week trial resulted in a jury verdict for Cole for $100,000 in compensatory damages.

At trial, Cole introduced evidence that he was not guilty of the professional malpractice imputed to him by the station's statements to the reporters, and, to show actual malice, he introduced evidence that these statements were fabricated by the station as a cover-up for the real reasons for his firing. He contended and the jury decided that he was fired because Yanoff and Westinghouse bowed to political pressure from Boston Mayor Kevin H. White (whose campaign fundraising Cole was investigating with a series of news stories) and because Cole was resisting the new "happy talk" style of local television news which Yanoff was implementing at WBZ. Relying primarily on decisions of this Court, the Supreme Judicial Court disregarded settled rules of procedure and reversed, holding the statements imputing journalistic malpractice to Cole to be non-actionable opinions.

A more detailed statement of the facts is necessary, because the Supreme Judicial Court's opinion ignores Cole's view of the evidence, which was before it and which the jury must be assumed to have accepted.

Cole's "investigative reporting" on the Mayor's re-election campaign fundraising uncovered questions about the propriety of some of the Mayor's activities. The Mayor's office retaliated with harrassment of WBZ and surveillance of Cole. At one point, the Mayor and WBZ's news director, William Aber, met for lunch to discuss the situation. The Mayor made it clear that it would be better for all concerned if Cole no longer worked in Boston. Cole's unfavorable campaign coverage of Mayor White in an earlier campaign (when he was an unsuccessful candidate for Governor) had been curtailed by WBZ following a threat of retaliation by the Mayor against

WBZ. On several occasions in 1974 and 1975, Yanoff indicated to Cole that he should focus on something other than the Mayor's fundraising.

Finally, on March 12, 1975, Aber called Cole into his office and told him that he had been directed by Yanoff to tell Cole that the station management did not like Cole's investigation of Mayor White or his attitude about "happy talk" (which then was a new style of local television news in which the on-the-air personalities engage in chit-chat with each other throughout the show). Cole had recently rejected an offer from WBZ to become a co-anchorman on the news shows because it would require him to engage in "happy talk" on the air and prevent him from continuing his serious political reporting. Aber said that it should be clear to Cole that he had no future at WBZ and, therefore, that he should suggest an amount of money which he would accept to leave the station. Cole replied that he wanted to continue his investigation of the Mayor's fundraising until it was picked up by some official body with subpoena powers.

The following day, March 13, 1975, Cole covered a public meeting of the Boston Finance Commission, which is a public agency with investigative powers. At the meeting, the chairman of the Commission noted that Cole had prepared television news stories and written newspaper articles about the Mayor's fundraising. The chairman said that he thought the Commission should investigate the matter. The Commission proceeded to vote to undertake such an investigation. Cole then sought, but did not succeed in obtaining, a reaction to the Commission's vote from the Mayor's office.

Upon returning to the WBZ newsroom, Cole was given some film which had been taken by WBZ's consumer reporter at a press conference by Mayor White on a consumer matter. That press conference had occurred several hours *before* the Finance Commission meeting. Cole was told by the consumer

reporter and the producer of the news show that this film showed the Mayor making a general statement about fundraising in response to a question which had not been filmed by WBZ because it had been asked by a reporter from another station. Cole elected not to use this film in his own news story, because WBZ did not know the question asked the Mayor and because the Mayor's statement had occurred several hours before the Finance Commission meeting where the vote was taken to proceed with the investigation. Cole's report became the "top story" on WBZ's news show that evening. Later in the show, Aber caused another story to be run including the Mayor's statement about fundraising at the press conference attended by the consumer reporter. To introduce this story, one of the anchormen said, "Mayor White was asked today at a City Hall news conference about the FinCom investigation into his fundraising that Jack Cole reported earlier in this newscast. The Mayor replied. . . ." Aber complained to Yanoff that Cole should have presented the Mayor's statement in this fashion. Cole contended that it would be misleading to the viewers to present the Mayor's statement as a response to an event which had not yet occurred when the statement was made.

Cole was immediately suspended and later fired. Yanoff prepared a written statement to be released by WBZ in response to inquiries about Cole's termination. It said that Cole had been terminated "for reasons of misconduct and insubordination." Yanoff's pre-trial deposition testimony, which was admitted into evidence at trial, was that he had given the statement directly to Amy Konowitz, who had no involvement with the WBZ news reporters on a day-to-day basis. At trial, Yanoff admitted changing his story and said that he had given the statement to Alex Dusek, Konowitz's superior.

Amy Konowitz received inquiries about why Cole was fired. When asked for comment beyond Yanoff's statement referring

to "misconduct and insubordination," Konowitz told a reporter for the *Boston Globe* that Cole's firing was a case of "sloppy and irresponsible reporting." She was similarly asked for information beyond the Yanoff statement by a reporter for the *Boston Phoenix*, who asked whether the Finance Commission story had been the specific reason for Cole's firing. Konowitz replied, "That was just the last straw. Jack [Cole] was fired for history of bad reporting techniques." Konowitz's comments were republished by the newspapers.

In July, 1975, after Cole's termination, Mayor White said to a reporter for the *Boston Globe*, "I'll get you just like I got Cole if you don't get off my case."

Cole commenced this action for defamation in Suffolk Superior Court in April, 1975. All defendants moved for directed verdicts at the close of the plaintiff's case, and Konowitz's motion was allowed. Westinghouse and Yanoff moved again for directed verdicts at the close of all the evidence. Neither Westinghouse nor Yanoff contended in any of these motions that the statements "sloppy and irresponsible reporting" and "history of bad reporting techniques" as reasons for Cole's firing were non-actionable statements of opinion, nor did their counsel so argue. In addition to the verdict for Cole for $100,000, the jury found in answer to the special question that Cole was a public figure.

Westinghouse and Yanoff subsequently moved for judgment notwithstanding the verdict or, in the alternative, for a new trial, contending that the foregoing statements were non-actionable opinion. These motions were denied. Westinghouse and Yanoff appealed. Cole cross-appealed from the judgment for Konowitz and from the trial court's application of constitutional standards flowing from *New York Times Co. v. Sullivan*. The Supreme Judicial Court of Massachusetts reversed, holding on constitutional grounds that the statements were non-actionable statements of opinion.

Reasons for Granting the Writ.

There is Conflict Among State Courts of Last Resort About Whether Constitutional Standards Apply to Cases of Private Defamation, Which This Court Has Recognized as an Open Question.

The Supreme Judicial Court held that the statements that Cole was fired for being a "sloppy and irresponsible reporter" with a "history of bad reporting techniques" were non-actionable statements of opinion. As discussed more fully below (at p. 19), this holding was on constitutional grounds. Thus, the Supreme Judicial Court's application of constitutional standards to determine what statements are actionable implicitly rejected Cole's contention in his cross-appeal that such standards do not apply to cases of private defamation, i.e., cases between a non-media defendant and a public person with respect to a private matter.

In *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323 (1974), this Court addressed the following problem:

> The principal issue in this case is whether a *newspaper* or *broadcaster* that publishes defamatory falsehoods about an individual who is neither a public official nor public figure may claim a constitutional privilege against liability for the injury inflicted by those statements. *Id.* at 332 (emphasis added).

This Court held in *Gertz* that, so long as they do not impose liability without fault, the states may define for themselves "the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual." *Id.* at 347. This result was reached by balancing the

competing interests, which are the individual's right to the protection of his own good name (which has been the subject of the states' common law of defamation) and the need to avoid "media self-censorship" induced by the strict liability standard (i.e., truth as a defense) usually imposed by that common law. *Id.* at 340-343. Thus, both by the nature of the analysis and the language used by this Court, *Gertz* is applicable to cases involving private plaintiffs and media defendants. It has no application to an action by a private plaintiff (or by a public plaintiff in relation to a private matter) against a non-media defendant. In this case, WBZ did not state on its own news program that Cole was fired for being a "sloppy and irresponsible reporter" with a "history of bad reporting techniques." Thus, WBZ was acting like any other private employer in responding to inquiries about a former employee rather than as a media defendant conveying news directly to the public.

In response to the special question the jury found that Cole was a public figure, but Cole appealed the trial court's refusal to instruct the jury that a person who is a public figure for most purposes is to be treated as a private person if the defamation is in relation to a private matter. This distinction grows out of this Court's opinion in *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323 (1974), where it was stated:

> We would not lightly assume that a citizen's participation in community and professional affairs rendered him a public figure for all purposes. Absent clear evidence of general fame or notoriety in the community, and pervasive involvement in the affairs of society, an individual should not be deemed a public personality for all aspects of his life. It is preferable to reduce the public-figure question to a more meaningful context by looking to the nature and extent of an individual's participation in the particular controversy giving rise the defamation. *Id.* at 352.

Cole contended that his employment relationship with WBZ was not a public matter, that the newsworthiness of his firing did not make it a public matter, *Time, Inc.* v. *Firestone*, 424 U.S. 448, 453-455 (1976), and that WBZ's publicizing it did not make it a public matter, *Hutchinson* v. *Proxmire*, 443 U.S. 111, 135-136 (1979).

Thus, Cole's cross-appeal presented the question of the applicability of the constitutional standards initially enunciated in *New York Times Co.* v. *Sullivan* to a case of a private plaintiff (i.e., a public figure but in relation to a private matter) and a non-media defendant. This Court has noted that this is an open question. *Hutchinson* v. *Proxmire*, 443 U.S. 111, 133 n.16 (1979). State courts of last resort are in conflict on this question. In Maryland, the Court of Appeals held constitutional standards to apply to private defamation in an action by an employee against the former employer in *Jacron Sales Co.* v. *Sindorf*, 276 Md. 580, 350 A.2d. 688 (1976). Other courts have applied common law rules to such cases. *Stuempges* v. *Park, Davis & Co.*, 297 N.W.2d 252 (1980); *Rowe* v. *Metz*, 195 Colo. 424, 579 P.2d 83 (1978); *Harley-Davidson Motor Sports, Inc.* v. *Markley*, 279 Or. 361, 568 P.2d 1359 (1977); *Calero* v. *Del Chemical Corp.*, 68 Wis. 2d 487, 228 N.W.2d 737 (1975). The time has come for this Court to resolve this controversy by determining whether the constitutional standards apply to cases of private defamation.

THE SUPREME JUDICIAL COURT HAS MISCONSTRUED THE DECISIONS OF THIS COURT AS REQUIRING IT TO DEPART FROM ITS SETTLED RULE OF PROCEDURE THAT JUDGMENT NOTWITHSTANDING THE VERDICT MAY NOT BE ENTERED ON A GROUND NOT STATED IN THE MOTION FOR DIRECTED VERDICT AT THE CLOSE OF ALL THE EVIDENCE.

Rule 50 of the Massachusetts Rules of Civil Procedure (the provisions of which are set forth in Appendix C) is patterned

on the parallel Federal Rule and, with respect to motions for judgment notwithstanding the verdict, is identical. The requirements of the Massachusetts Rule are well settled:

> Because a motion for judgment n.o.v. in effect seeks to provoke a ruling on a prior motion for directed verdict (made at the close of all the evidence), obviously the earlier motion is a prerequisite to the granting of the later one; failure to move for a directed verdict precludes moving later for judgment n.o.v. Further, a motion for directed verdict based upon one stated ground cannot father a motion for judgment n.o.v. based upon a different ground, even if the second ground is otherwise valid. J. Smith & H. Zobel, Rules Practice § 50.14, Massachusetts Practice Series (1977) (citations omitted).

The Supreme Judicial Court has stated that where, as here, the Massachusetts and Federal Rules are in the same or substantially the same form, the adjudged construction given to the Federal Rule is to be given to the parallel Massachusetts Rule absent compelling reasons to the contrary. *Rollins Environmental Services, Inc.* v. *Superior Court*, 368 Mass. 174, 179-180, 330 N.E.2d 814, 818 (1975). It is settled that the requirements of the Federal Rule for the foundational motion are the same. E.g., *House of Koscot Development Corp.* v. *American Line Cosmetic, Inc.*, 468 F.2d 64, 66 (5th Cir. 1972); Wright & Miller, Federal Practice and Procedure § 2537 (1971), and cases cited at n.37.

Notwithstanding the clarity of the requirements of Mass. R. Civ. P. 50(b), the Supreme Judicial Court refused to enforce them in this case. The defendants' motions for directed verdict after the plaintiff's case and at the close of the evidence did not assert that the statements in issue were non-actionable

opinion, but the trial judge's denial of judgment notwithstanding the verdict was reversed on this ground. The only authority cited by the Supreme Judicial Court for this departure from Rule 50(b) was *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964). However, it is abundantly clear that nothing in *New York Times* requires or even suggests this result. There, this Court stated its scope of review broadly:

> Since respondent may seek a new trial, we deem that considerations of effective judicial administration require us to review the evidence in the present record to determine whether it could constitutionally support a judgment for respondent. This Court's duty is not limited to the elaboration of constitutional principles; we must also in proper cases review the evidence to make certain that those principles have been constitutionally applied. This is such a case, particularly since the question is one of alleged trespass across "the line between speech unconditionally guaranteed and speech which may legitimately be regulated." *Speiser* v. *Randall*, 357 U.S. 513, 525. In cases where that line must be drawn, the rule is that we "examine for ourselves the statements in issue and the circumstances under which they were made to see . . . whether they are of a character which the principles of the First Amendment, as adopted by the Due Process Clause of the Fourteenth Amendment, protect." *Pennekamp* v. *Florida*, 328 U.S. 331, 335; see also *One, Inc.* v. *Olesen*, 355 U.S. 371; *Sunshine Book Co.* v. *Summerfield*, 355 U.S. 372. We must "make an independent examination of the whole record," *Edwards* v. *South Carolina*, 372 U.S. 229, 235, so as to assure ourselves that the judgment does not constitute a forbidden intrusion on the field of free expression. 376 U.S. at 284-285 (1964) (footnote omitted).

The cases cited in this passage involve findings of fact or procedures for finding facts which, if themselves immune from review, would prevent the reviewing court from reaching a constitutional question of law. The Supreme Judicial Court was not faced with this problem and has misapplied the *New York Times* rule to an entirely different situation. What the Supreme Judicial Court has done is to reach out for an issue which the defendants themselves did not properly preserve for appellate review (or even for review by the trial court after the jury's verdict) according to the settled state procedure and use it to overturn the jury's verdict.

The decisions of this Court demonstrate that *New York Times* was not intended to require this result. It is well settled that, in the absence of evasion, state procedures govern the raising and preservation of even constitutional issues.

> Without any doubt it rests within each State to prescribe the jurisdiction of its appellate courts, the mode and time of invoking that jurisdiction, and the rules of practice to be applied in its exercise; and the state law and practice in this regard are no less applicable when Federal rights are in controversy than when the case turns entirely upon questions of local or general law. *Wolfe* v. *North Carolina*, 364 U.S. 177, 195 (1960), *quoting John* v. *Paullin*, 231 U.S. 583, 585 (1913) (citations omitted).

Specifically, this Court will not reach out for even constitutional issues which have not been properly preserved by the parties:

> No procedural principle is more familiar to this Court than that a constitutional right may be forfeited in crimi-

nal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it. *Yakus* v. *United States*, 321 U.S. 414, 444 (1944).

Even if the foregoing are statements of only generally applicable rules, *New York Times Co.* v. *Sullivan* cannot be taken to adopt a different rule for cases of possible conflict between the requirements of the First and Fourteenth Amendments and state law of defamation. In *Curtis Publishing Co.* v. *Butts*, 388 U.S. 130, 142-145 (1967), this Court proceeded through a lengthy analysis of the question of whether the constitutional issues raised by Curtis were properly before it. If this Court had intended *New York Times* to have the effect which the Supreme Judicial Court of Massachusetts gave it, this analysis would have been entirely superfluous. Like the Supreme Judicial Court, this Court simply could have grasped the constitutional issue which it perceived, citing *New York Times*, without any regard to the procedural history. By undertaking the procedural analysis, this Court demonstrated its own intent that the *New York Times* rule for scope of review does not extend as far as the Supreme Judicial Court of Massachusetts tried to take it in this one case.

The Supreme Judicial Court's misapplication of *New York Times* engenders mischief far beyond this single case presented by Cole. The purpose of firm procedural rules is to permit reliance by parties in the trial of cases where their vital interests are at stake. The fact that constitutional values may be involved in a particular case is no excuse to disregard the generally applicable and firm procedural rules. Constitutional values are better protected by procedural order than by procedural confusion. The Supreme Judicial Court's view that the First Amendment requires it to take a roving commission to dispose

of the case on any basis which it sees, rather than limiting itself to the issues properly preserved by the parties, permits a party to avoid taking a certain position at one stage of the litigation for tactical reasons and, later, to have a manifestly unfair second chance to press the position if the original tactic fails. *See Curtis Publishing Co.* v. *Butts*, 388 U.S. 130, 168 (1967) (Warren, C.J., concurring in result). If the trial judge remembered the pre-trial motion to dismiss on the ground of non-actionable opinion (which motion the Supreme Judicial Court's opinion notes was not ruled upon, 386 Mass. at 307) in the context of the directed verdict motions at the close of the evidence (which omitted this ground), his only logical conclusion would have been that this ground had been abandoned for tactical reasons. In fairness and to uphold reliable procedural rules, he refused to permit the issue to be revived after the tactic failed-and the jury had given its verdict to Cole. The Supreme Judicial Court should be instructed that the First Amendment does not require the contrary.

THE SUPREME JUDICIAL COURT OF MASSACHUSETTS HAS MISTAKENLY USED THE FIRST AND FOURTEENTH AMENDMENTS TO IMMUNIZE STATEMENTS WHICH OTHERWISE WOULD BE DEFAMATORY *Per Se* BECAUSE THEY ATTRIBUTE PROFESSIONAL MALPRACTICE TO A TELEVISION JOURNALIST.

As a matter of the Massachusetts law of defamation, the Supreme Judicial Court seems previously to have adopted the Restatement (Second) of Torts § 566 (1977). *National Association of Government Employees, Inc.* v. *Central Broadcasting Corp.*, 379 Mass. 220, 227-228, 396 N.E.2d 996, 1000-1001 (1979), cert. denied, 446 U.S. 935 (1980). Section 566 states:

> A defamatory communication may consist of a statement in the form of an opinion, but a statement of this nature is actionable only if it implies the allegation of undisclosed defamatory facts as the basis for the opinion.

The Supreme Judicial Court also seems to read § 566 as superseding prior rules of fair comment. *National Association of Government Employees, Inc.* v. *Central Broadcasting Corp.*, 379 Mass. at 227 n. 8. Comment c to § 566 recapitulates the effect of this rule in terms of four fact patterns, only the first and fourth of which subject the speaker to liability:

> (1) If the defendant bases his expression of a derogatory opinion of the plaintiff on his own statement of false and defamatory facts, he is subject to liability for the factual statement but not for the expression of opinion.
>
> (2) If the defendant bases his expression of a derogatory opinion of the plaintiff on his own statement of facts that are not defamatory, he is not subject to liability for the factual statement — nor for the expression of opinion, so long as it does not reasonably indicate an assertion of the existence of other, defamatory, facts that would justify the forming of the opinion. The same result is reached if the statement of facts is defamatory but the facts are true (see § 581B), or if the defendant is not shown to be guilty of the requisite fault regarding the truth or defamatory character of the statement of facts (see §§ 580A and 580B), or if the statement of facts is found to be privileged. (See § 593-612.)
>
> (3) If the defendant bases his expression of a derogatory opinion on the existence of "facts" that he does not state but that are assumed to be true by both parties to the communication, and if the communication does not

> give rise to the reasonable inference that it is also based on other facts that are defamatory, he is not subject to liability, whether the assumed facts are defamatory or not.
>
> (4) If the defendant expresses a derogatory opinion without disclosing the facts on which it is based, he is subject to liability if the comment creates the reasonable inference that the opinion is justified by the existence of unexpressed defamatory facts. *It makes no difference whether this is explained by holding that there was thus a publication of false, defamatory facts* (thus making § 565 applicable) *or that an expression of a mixed opinion can itself be a defamatory communication.* Restatement (Second) of Torts § 566 comment c (1977) (emphasis added).

It is most important to note, as the emphasized portion of category (4) points out, that the matter of classifying the statements in issue as fact or opinion ultimately is of no importance. The real question is whether the statement in issue (regardless of how it is labeled) implies additional, unstated facts as the basis for the statement.

The statements that Cole was a "sloppy and irresponsible reporter" and had a "history of bad reporting techniques" in response to the reporters' questions about why Cole was fired clearly fall into category (4) and, thus, are actionable. The unexpressed, defamatory facts implied are that on specific occasions comprising the "history" Cole has been guilty of professional malpractice in his off-the-air activities in preparing his news stories. Allegations of professional malpractice are not incapable of being proved true or false. Such proof is made daily in trial courts to juries. Much of the evidence at Cole's trial concerned his careful preparation of specific news stories while at WBZ. The jury's verdict in favor of Cole must be taken as a finding that the implied facts underlying the alle-

gations of professional malpractice were false. Indeed, such imputations of professional incompetence have traditionally been viewed as such hard core defamation as to be actionable *per se*, without allegation or proof of special damages. *Craig* v. *Proctor*, 229 Mass. 339, 341, 118 N.E. 647, 648 (1918) (slander). As a member of this Court has pointed out:

> It is one thing to say that lawyers are shysters and that doctors are quacks, but it is quite another matter — indeed, it is libellous *per se* — to publish that lawyer Jones is a shyster or that Doctor Smith is a quack. *Old Dominion Branch No. 496, National Association of Letter Carriers, AFL-CIO* v. *Austin*, 418 U.S. 264, 297 (1974) (Powell, J., dissenting).

Moreover, the statements by Konowitz were outside the privilege available to a former employer when responding to an inquiry from a prospective employer about the former employee, because the reporters to whom she spoke were not acting as prospective employers. See *Burns* v. *Barry*, 353 Mass. 115, 119, 228 N.E.2d 728, 731 (1967). Thus, *Cole* presents the type of case where the law is most protective of the party defamed.

Under the law of fair comment found in the first Restatement of Torts § 606 (1938), statements were privileged only if, among other things, they were upon known or available facts. Comment b to § 606 makes clear that the distinction there between actionable and non-actionable expressions of opinion is fundamentally the same as under § 566 of the Restatement (Second) of Torts. Additionally, to be privileged fair comment, the statement had to represent the actual opinion of the speaker. The jury's verdict for Cole must be taken to have shown that the statements by Konowitz were not the real opinion of Yanoff or Konowitz but were fabricated as a cover-up

for the real reasons for Cole's firing. *See Widener* v. *Pacific Gas and Electric Co.*, 75 Cal. App. 3d 415, 436-37, 142 Cal. Rptr. 304, 315 (1977), cert. denied, 436 U.S. 918 (1978); *Stone* v. *Essex County Newspapers, Inc.*, 367 Mass. 849, 867, 330 N.E.2d 161, 173 (1975). Finally, "misconduct and insubordination" as the "official" reasons for Cole's termination cannot serve as stated facts upon which the further statements "sloppy and irresponsible reporter" and "history of bad reporting techniques" might be based (so as to render the latter statements non-actionable). The statements "sloppy and irresponsible reporter" and "history of bad reporting techniques" cannot be inferred from the statement "misconduct and insubordination" alone, without some additional information. Thus, the former statements suggest that such additional, unstated information exists to justify the former statements. Here, that implied information is that Cole had been guilty of professional malpractice on the occasions comprising the "history." The Restatement of Torts states that, for fair comment, "[i]t is necessary . . . that the comment have some relation to the facts upon which it is made. If it has not, *it may well be taken to imply the existence of other undisclosed defamatory facts* (see Comment *b*)." Restatement of Torts § 606 Comment c (emphasis added). See also F. Harper & F. James, The Law of Torts § 5.28 at 459-460 (1956).

The Supreme Judicial Court of Massachusetts has misinterpreted the First and Fourteenth Amendments as requiring that the statements attributing professional malpractice to Cole be treated as non-actionable opinions. The Supreme Judicial Court clearly views the distinction between fact and opinion as having constitutional significance. *Myers* v. *Boston Magazine Co.*, Mass. Adv. Sh. (1980) 907, 911 n. 3, 403 N.E.2d 376, 378 n.3. See also, Restatement (Second) of Torts § 566 comment c (1977). The Supreme Judicial Court cites several cases holding statements of opinion to be constitutionally non-

actionable. However, none of them falls into category (4) of the foregoing recapitulation of the Restatement (Second) of Torts § 566. This Court's decision in *Greenbelt Cooperative Publishing Association, Inc.* v. *Bresler*, 398 U.S. 6 (1970), clearly is a category (2) case, with all of the underlying facts stated. In *Old Dominion Branch No. 496, National Association of Letter Carriers, AFL-CIO* v. *Austin*, 418 U.S. 264 (1974), this Court held the word "scab" to be a true statement of fact. The word "traitor" was held to be used in a "loose, figurative sense" as a matter of opinion rather than fact. *Id.* at 284. In contrast, there is nothing loose or figurative about the words "sloppy and irresponsible reporter" and "history of bad reporting techniques" when stated in response to the question why Cole was fired. These responses are either factual or, if opinion, suggestive of unstated facts and, in either event, actionable under category (4). By contrast, *Myers* v. *Boston Magazine Co., Inc.*, Mass. Adv. Sh. (1980) 907; *Information Control Corp.* v. *Genesis One Computer Corp.*, 611 F.2d 781 (9th Cir. 1980); *Buckley* v. *Littell*, 539 F.2d 882 (2nd Cir. 1976); and *Rinaldi* v. *Holt, Reinhart & Winston, Inc.*, 42 N.Y.2d 369, cert. denied, 434 U.S. 969 (1977), are category (2) or (3) cases. For example, in *Myers* (a category (3) case), the assumed facts were the plaintiff's on-the-air performances in contrast to Cole's off-the-air activities in assembling information and putting together his news stories.

Thus, the Supreme Judicial Court has misapplied all of the foregoing cases, none of which properly falls under category (4), in holding Cole's case, which does fall under category (4), to involve constitutionally non-actionable opinion. Nothing in this Court's decisions in *Old Dominion* or *Greenbelt* requires this result in a category (4) case. Indeed, this Court explicitly distinguished the facts presented in both cases from those that would be presented in a category (4) case. In *Old Dominion*, 418 U.S. at 286, this Court said:

> This is not to say that there might not be situations where the use of this writing or other similar rhetoric in a labor dispute could be actionable, particularly if some of its words were taken out of context and used in such a way to convey a false representation of fact. *See, Greenbelt Cooperative Publishing Assn., Inc.* v. *Bresler, supra,* at 13.

Statements of professional malpractice or incompetence go "to the heart of [a plaintiff's] ability to earn a living. . . ." *Zacchini* v. *Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 576 (1977). The gravity of the state's interest in providing redress in such cases requires further

> clarification of the relationship between libel law and freedom of speech and press, lest the rule of *New York Times* become a talisman . . . which goes far to immunize the press from having to make just reparation for the infliction of needless injury upon honor and reputation through false publication. *Curtis Publishing Co.* v. *Butts*, 388 U.S. 130, 135 (1967).

"Freedom of the press under the First Amendment does not include absolute license to destroy lives or careers." *Id.* at 170 (Warren, C.J., concurring in result). This Court should instruct the Supreme Judicial Court that the First Amendment does not deny Cole his proper remedy.

Conclusion.

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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